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Episode 13: Oral Arguments

Previously on In the Dark:

News Archive: The United States Supreme Court has granted Curtis Flowers' petition for review. The Court will determine whether there was racial bias...

John Roberts: It is unconstitutional to strike a prospective juror on account of race.

Ray Charles Carter: Wasn't no doubt that he was trying to get rid of all the black folks. That's exactly what he's trying to do.

James Bibbs: They just told me I was under arrest, you know. Had the police come and put handcuffs on me and take me to jail.

MB: Right there from the courtroom

Bibbs: Right.

Alexander Robinson: The lawyers, they grilled us. They asked a lot of questions. All kinds of questions.

Flancie Jones: They don't say why. They don't say why. They just say you can go.

Gate agent: Group 9 passengers are welcome to board, C14 to D.C.

This is In the Dark, an investigative podcast by APM Reports. I'm Madeleine Baran. This season is about the case of Curtis Flowers, a black man from a small town in Mississippi who's spent the past 22 years fighting for his life — and a white prosecutor who's spent that same time trying just as hard to execute him.

Pilot: Ladies and gentlemen, we are currently 80 miles to the west of Washington, D.C.

Today, we go to Washington D.C., to the nation's highest court, to hear oral arguments in the case of Curtis Flowers versus Mississippi. At the center of all of this is a question: Did District Attorney Doug Evans violate the Constitution in Curtis' latest trial, the sixth one? Did he strike black people from that jury because of their race? If the Supreme Court finds that the answer is yes, then it will overturn Curtis' conviction and death sentence.

Natalie Jablonski: Okay, we're here.

Madeleine Baran: The Supreme Court.

Samara Freemark: Let's do it.

Madeleine Baran: March 20th.

We got to the Supreme Court around six in the morning. It was still dark out, and the Court building was all lit up. Already, there was a long line of people that curved down the block and around the corner—people waiting to get in to watch oral arguments.

Madeleine Baran: Is this the front of the line?

Roger Bransford: This is the beginning of the line. The end of it is all the way around there, which, they're not gonna make it.

Alex Bransford: I've been here since midnight. So, it's—

Madeleine Baran: Are you serious?

Alex Bransford: My dad here flew from Japan. He flew from Japan to see this, so.

Madeleine Baran: Wow.

Roger Bransford: Well, who wouldn't fly from Japan so you could come out here at midnight and sit in the 20-degree temperature. This is great.

Alex Bransford: I figured if I was going to come early, I might as well come really early.

Samara Freemark: What's your name?

Alex Bransford: Alex Bransford.

Alex Bransford is a law student. And one of his professors is Sheri Johnson, the lawyer for Curtis who was going to be arguing in front of the court today.

Alex Bransford: I texted her at 12:46. I sent her a picture of me lying on the ground with the Supreme Court behind me and I said, 'I'm number two in line to see you.' And I'm actually mortified that I did that because I don't know if I woke her up.

Madeleine Baran: It's a big deal to argue in front of the Court.

Alex Bransford: Yeah, it feels like a...you can tell she knows it's a big deal. You see this person who's so intimidating and seems to know everything and see her act a little bit nervous. It's kind of humbling.

Madeleine Baran: Alright, we're going to go walk this line.

Madeleine Baran: So how long have you been in line?

Angel Darvalics: Since four. My cousin came with me, and he's the one that's doing the coffee runs.

Barb Munro: Came from Massachusetts.

Natalie Jablonski: Massachusetts? What made you want to come out today?

Barb Munro: Just the injustice of it all. Like c'mon. It's crazy. When do they say stop?

Samara Freemark: What did you bring today? What's your setup?

Shareese Clarke: I just brought a chair because I knew it was gonna be a while. A couple hand warmers, a battery pack, earphones and a blanket to keep warm. My feet are cold, I'd say, but other than that, I feel pretty good, yeah.

When we got to the Supreme Court, there were already more than 100 people in line. And more people kept showing up, hundreds of people. More than 400 in all.

Madeleine Baran: So the sun is out now, sort of, the line is long. A lot of these people are not getting in. I would say most people are not getting in. Do you think you're gonna get in?

Unidentified person: I don't know!

Jackson Sasser: I mean, you know this is a podcast line, right? So I was here for McCoy against Louisiana last January. I was here at five in the morning, so 20 minutes later than today. And I was number two. There's no question this is more.

A teenage girl named Lily and her father were holding signs.

Lily Popoli: So there's a picture of Curtis, and under the picture it says, 'Free Curtis.' So yeah, my dad made it the other day, so we decided to bring it up. And we also made t-shirts that also say, 'Free Curtis,' to give it out to anyone that wants one. I'm wearing one.

Natalie Jablonski: So, what made you want to make the shirts?

Lily Popoli: Well, I've been writing to Curtis since June, and when you guys announced the trial would be here, I was like, oh, you know I want to show my support for him 'cause he can't be here.

Madeleine Baran: So what do you think's gonna happen?

Ellie Fogleman: I don't really know, honestly. It seems really egregiously wrong. And so I hope that they recognize that.

Jared Ham: I am going to be watching the questioning from Justices Roberts and Kavanaugh. I think those two have been the swing votes in some of the cases that have come out recently, with them siding with the liberals.

Madeleine Baran: What do you hope will happen?

Max Mayes: Like everybody else, that the court will decide by June to overturn his conviction, hopefully. I'm optimistic.

Madeleine Baran: Hey, Tucker.

While we were outside, we ran into Tucker Carrington, one of the lawyers working on Curtis' post-conviction.

Tucker Carrington: Hey y'all. How's it going?

Madeleine Baran: Good.

Tucker Carrington: Nice to see you.

Madeleine Baran: Good to see you.

Tucker Carrington: It's cold out here.

Madeleine Baran: How are you feeling?

Tucker Carrington: Good. I'm feeling good. I think we'll be all right. That's what I'm hoping. One way or the other, we'll win this case, somehow.

Madeleine Baran: Do you think you'll win it here?

Tucker Carrington: I'm hoping that we win it here. It'd be easier that way. But I, you know, I feel confident, one way or the other. One of these days.

Madeleine Baran: The press is starting to go in. We're gonna go in.

Samara Freemark: Okay.

Madeleine Baran: All right.

Samara and I had press passes, so we didn't have to wait in line. A little before 10 a.m., we took our seats inside the Court in the press area, off to one side.

The room where the Supreme Court hears cases is small. It's all one level. There are floor to ceiling windows on two sides. Up at the front there are nine high-backed black leather chairs. And behind them, four big marble pillars and thick red velvet curtains with gold fringe. And an American flag on either side.

The seats in the audience filled up right away. Maybe about 250 people were there. Once we had all sat down it wasn't long before a buzzer went off, and two people shouted "Oyez! Oyez!" And all of a sudden, the nine justices were there. They hadn't filed in. They'd just emerged, all at once, from behind openings in the curtains.

There was the Chief Justice John Roberts. He sat down in the middle seat. There were the more liberal justices: Justices Sonia Sotomayor, Elena Kagan, Stephen Breyer and Ruth Bader Ginsburg. When Justice Ginsburg sat down, her head was so low I could only see the part in her hair. And there were the more conservative justices: Justices Clarence Thomas, Samuel Alito, Brett Kavanaugh and Neil Gorsuch. The courtroom was so small that from where I was sitting I was probably no more than 40 feet from Justice Gorsuch.

Chief Justice Roberts spoke first.

Chief Justice Roberts: We'll hear argument this morning in Case 17-9572, Flowers versus Mississippi.

Curtis Flowers wasn't at the hearing. Neither was D.A. Doug Evans.

Curtis was being represented at the Supreme Court by a lawyer from New York named Sheri Johnson. She's a law professor and the Assistant Director of the Cornell Death Penalty Project.

Chief Justice Roberts: Ms. Johnson.

Sheri Johnson approached the podium. She had a precise manner about her. Her posture was straight. She didn't move around a lot. She looked, in a word, composed.

Sheri Johnson: Mr. Chief Justice, and may it please the Court: The only plausible interpretation of all of the evidence viewed cumulatively is that Doug Evans began jury selection in Flowers VI with an unconstitutional end in mind, to seat as few African American jurors as he could. The numbers alone are striking. In the first four trials, Mr. Evans exercised 36 peremptory challenges, all of them against African American jurors. In the sixth trial, he exercised five out of six of his challenges against African American jurors. If we look at the numbers of his, regarding his questioning, they are likewise stark. He asked of the struck African American jurors an average of 29 questions. He asked of the seated white jurors an average of 1.1 questions. But these numbers do not stand alone. Mr. Evans was twice found to have discriminated on the basis of race in the exercise of his peremptory challenges against African American defendants in trials of the same case against the same defendant.

Here, Sheri Johnson was referring to the two times Doug Evans had been caught striking black prospective jurors because of their race in Curtis' earlier trials. It's called a Batson violation. It's named after a Supreme Court case called Batson v. Kentucky. Curtis Flowers' third conviction was actually overturned because Doug Evans committed a Batson violation.

Sheri Johnson: There is no one who has a record of discrimination, adjudicated discrimination, like that of Mr. Evans.

Lawyers who argue before the Court rarely get to talk long without being interrupted with a question, and that's exactly what happened with Curtis' lawyer. After Sheri Johnson laid out the main points of her case, one of the more conservative justices, Justice Alito, jumped in.

Justice Alito: The history of the case prior to this trial is very troubling, and you've summarized that. And it is — it is cause for concern and is certainly relevant to the decision that ultimately has to be made in the case.

But Justice Alito didn't want to talk about the bigger theme of history. He wanted to talk about the details of what had happened in jury selection in the sixth trial.

Justice Alito: But if we were —and I'm not suggesting that this is the way it should be analyzed; this is not the way it should be analyzed —but if we were to disregard everything that happened before this trial, and we looked at the strikes of the black

prospective jurors as we would in any other Batson case, do you think you'd have much chance of winning?

Sheri Johnson: The evidence still is clear and convincing that Mr. Evans acted with discriminatory motivation in this case, even if we set aside his history and his --the reasons that he was unwilling to tell the truth in previous cases.

Justice Alito: I mean, if we look at --at the jurors in question one by one, there are aspects that I think would cause any prosecutor anywhere to want to get that jury--that juror off the jury.

Justice Alito kept going. And he was being pretty tough on Curtis' lawyer. He was saying maybe Doug Evans DID have valid reasons to strike those five black prospective jurors in the sixth trial, reasons that didn't have anything to do with race.

Justice Alito: There's a juror who said that she --she couldn't view the evidence objectively. She couldn't make a decision based just on the evidence. There's one who said that she, because of her acquaintance with members of the Flowers family, she would lean toward the defendant. Another one who admitted that she made a false statement on her juror questionnaire because she'd say anything to get off the jury. I mean, do you think those are--those are Batson claims that would likely succeed if this troubling history had not preceded this case?

Sheri Johnson: This Court has demanded a sensitive inquiry into all of the circumstances that prove racial discrimination. And, again, even setting aside his history, there are many circumstances here that suggest racial motivation.

In her briefs to the Supreme Court, Johnson told the Court that Doug Evans treated black jurors differently from white jurors. She said Evans asked black jurors more questions, a lot more questions.

There's a phrase for this: "disparate questioning." And the Court in earlier cases has found that disparate questioning can be evidence of racial discrimination. The thinking is that if you're a prosecutor and you're looking to strike black people from your jury, one way to do it and get away with it is to just ask black people a lot of questions, because if you ask potential jurors enough questions, eventually they'll say something that you could use to strike them.

Justice Kagan: And can I ask you about the disparate questioning?

This is Justice Elena Kagan. She was appointed by President Obama.

Justice Kagan: Because you referred to something which struck me when --as I read through all of this. This is --unlike some Batson cases you see, it's a very small town where everybody knows everybody, apparently, or many people know many people, and it's a largely segregated town, where you might think that African Americans knew more African Americans than they would whites or vice versa. So does that account for some of the differential questioning? In other words, just sort of looking at the environment and

saying, I have to push more on whether X knew Y because, given the circumstances of the town, X might very well have known Y?

Sheri Johnson: The Mississippi Supreme Court said that it accounted for some of the differential questioning, and I think that's correct. There are more African American jurors who report relationships with defense witnesses or the defense family members. But there are five –five white jurors who report such relationships and whom the prosecutor did not ask questions about those relationships.

Like Larry Blaylock, a white man who was called for jury duty in Curtis' latest trial. Blaylock knew a lot of the people involved in the Flowers case. He knew victims, and witnesses. He was good friends with the DA's lead investigator. And he had a cousin who committed murder and had been prosecuted by Doug Evans.

Blaylock told us he figured he'd be struck for sure. And yet, he ended up on the jury. Blaylock thought that was odd and so did Justice Sotomayor.

Justice Sotomayor: I found it strange, but maybe you can –or unusual, I should say, not strange, unusual—that there were some white jurors who had people accused of crimes in jail, relatives accused of crimes in jails. Were there any questions about how that affected those white jurors?

Sheri Johnson: No, there were no questions about that at all.

If the Supreme Court is going to find in Curtis' favor, they need to find that at least one of the five African Americans struck from the jury in Curtis' sixth trial was struck because of race. The Court doesn't need to find that all five black prospective jurors were struck unconstitutionally. Even just one juror would be enough.

So Justice Alito asked Sheri Johnson what her strongest strike was, in other words, the one she thought was the most obviously egregious.

Justice Alito: What is your strongest strike?

Sheri Johnson: I –I think the most -the clearest case is that of Carolyn Wright.

Carolyn Wright was a black woman who was called for jury duty in trial six. In many ways, Wright seemed to be a good juror for the prosecution. She'd written on her jury questionnaire that she was strongly in favor of the death penalty. She had an uncle who worked as a prison guard and had been the victim of a violent crime. But Doug Evans struck Carolyn Wright from the jury. When he was asked for his reasons, Evans said, he struck Carolyn Wright because she'd been sued by Tardy Furniture after the murders for an unpaid bill.

Justice Sotomayor: Did he even ask Ms. Wright how she felt about that suit and whether it would affect her in this case?

That's Justice Sotomayor.

Sheri Johnson: In fact, she was asked about the suit. And when she was asked about that suit, what she said is that she had paid the debt and that she had no ill will toward the Tardys.

Doug Evans also said he struck Carolyn Wright because she worked with Curtis' father at Walmart.

Justice Alito: But isn't it true she also worked with the defendant's father?

This is Justice Alito.

Sheri Johnson: She worked in the same location as the defendant's father, but—

Justice Alito: She worked in the same store, right?

Sheri Johnson: She worked in the same store.

Justice Alito: At the world's smallest Walmart.

Sheri Johnson: That's what the —

Justice Alito: That's what they said.

Sheri Johnson: —that's what the trial court described it as. But —but it is important to notice that when she was asked does he still work there, she didn't even know if he still worked there.

Justice Sotomayor was also interested in Carolyn Wright. But she took it a step further. She wanted to compare Carolyn Wright with another woman in the jury pool.

Justice Sotomayor: Compare her with Pamela Chesteen. That comparison is the one that I'm most interested in.

Pamela Chesteen was a white woman who was called for jury duty in Flowers' sixth trial. And Chesteen wasn't struck by the prosecution.

Pamela Chesteen got a lot of attention from the justices in oral arguments. And the reason for that was, in some ways, she didn't seem all that different from Carolyn Wright, the black juror who was struck. Chesteen also knew the Flowers' family, as Curtis' lawyer explained to the Court.

Sheri Johnson: Juror Chesteen worked as a teller in a bank where all five of them came and she waited—

Justice Sotomayor: She said that she knew the father as well.

Sheri Johnson: Yes, she knew the father and the mother and two sisters and a brother.

So white juror Pamela Chesteen knew the Flowers from helping them at the bank where she worked, and the black juror Carolyn Wright, who was struck knew Curtis' father Archie Flowers from working at the same Walmart.

Justice Ginsburg spoke up.

Justice Ginsburg: That, that relationship of a bank teller to someone who comes to make a deposit different from someone who is a coworker and would encounter someone in the work set—setting on a daily basis?

Sheri Johnson: It is a different relationship or it could be a very different relationship. We can't actually even know the closeness of either relationship unless there was inquiry. But Doug Evans did not make that kind of an inquiry. Indeed, what he said to Juror Chesteen is – and that was a purely professional relationship. He didn't ask whether she had a close relationship, whether she was worried. He instead presumed, reassured, everyone that she did not.

During oral arguments each side gets 30 minutes to talk, including the questions from the justices. It wasn't until about halfway through Curtis' lawyer's time that the Chief Justice John Roberts asked his first question. This was the moment everyone was waiting for: to see if Chief Justice Roberts would give any kind of clue as to how he might vote. Because if Curtis was going to win, he would need the vote of at least one conservative justice. And the chief justice, based on his record, seemed like he might be the best bet.

Chief Justice Roberts: But, I mean, of course, as –as my colleagues have recognized, the case is unusual because you have the extensive history. And I think that's probably why the case is here for –for review. And I'm interested, because, obviously, the rule we adopt will apply in other cases, how far your argument that we need to look at the past history is –is pertinent.

What Chief Justice Roberts is getting at is that the lower courts in this country look to the Supreme Court for guidance on how to make decisions. So, if what the Court says in the Flowers case isn't clear, that could create a lot of confusion.

Chief Justice Roberts: If –if the prosecutor had –had one Batson violation in his 30-year career, 20 years ago, is that something that should be brought out and pertinent in the assessment of the current Batson challenges?

Chief Justice Roberts was saying it's clear the history matters. The question is, how much? Curtis' lawyer Sheri Johnson told Chief Justice Roberts that in his hypothetical, that kind of really old Batson violation would be worth considering, but it wouldn't be as relevant as the history in Curtis' case, where the same prosecutor had committed Batson violations more than once across multiple trials in the same case.

Sheri Johnson: So I think, when we conduct a consensitive inquiry, we look, as we would in a criminal case, we look at how recent a fabrication has been, whether it's on a relatively similar matter, whether the person has the same motive. So a case that

occurred 30 years ago would be very different in terms of motive. It also would be quite different in terms of the established law of this Court.

Chief Justice Roberts: Well—.

Sheri Johnson: So someone who violates Batson before it's announced or someone who violates Batson immediately thereafter, that's less probative than someone who has done so repeatedly.

Chief Justice Roberts: So --so what is --what is the rule you would have us adopt as a general rule, not just in a particular case as extreme as this one?

Sheri Johnson: The general rule is a rule that you have already adopted.

Johnson was telling the Court that they didn't need to create a new rule, they didn't need to announce some big shift in legal interpretation. All they had to do was correctly apply Batson, a rule they already had.

And it makes sense that Curtis' lawyer would say this, because her job isn't to rewrite the law. It's to win the case for Curtis. And the easiest way to do that is to say: You don't need to create a new rule to overturn this conviction. The law is already clear. All you have to do is apply it.

Sheri Johnson: With the Court's permission, I will reserve the rest of my time for rebuttal.

Chief Justice Roberts: Thank you, counsel.

After the break...the state takes its turn.

BREAK

Now, it was the state's turn. The state was being represented by a man named Jason Davis. He's a lawyer from the Mississippi Attorney General's office. He's not the attorney general himself. That man's name is Jim Hood, and he's actually running for governor right now in Mississippi as a Democrat.

Jason Davis got up and stood at the podium. He's a tall guy, well over six feet, but as he stood at the podium, he slumped forward a bit.

Jason Davis: Mr. Chief Justice, and may it please the Court:

Right away, Jason Davis conceded a pretty big point.

Jason Davis: The history in this case is troubling, but the history is confined to this case, and, as Mr. Chief Justice pointed out, it is unusual. There are --this is the sixth trial in this small town, a small town of approximately 5,000 individuals.

Davis started to address the question of the role history should play in the case.

Jason Davis: If we disengage this troubling history –and I agree, I'm not suggesting that, as Justice Alito said –however, if we take that out of the case, we—we don't have any taints.

Justice Alito: Could I just ask —

Justice Kavanaugh: We can't be —

Justice Alito: —a question of the Mississippi law?

Right away, Justice Alito had a question and he looked frustrated when he asked it.

Justice Alito: Could the attorney general have said, you know, 'Enough already, we're going to send one of our own people to try this case, preferably in a different county, where so many people don't know so many other people?' Could he have done that?

Jason Davis: Statutorily, the Attorney General's office is allowed to assist, is allowed to take over, but only upon request by that district attorney. So that was not an option in this case. We were not so requested.

Jason Davis had barely begun speaking and already Justice Alito, one of the court's most conservative justices, was jumping in, wanting to know why no one took the case away from the D.A. Doug Evans.

Things weren't going well for the state. And then Justice Kavanaugh spoke. He's another one of the Court's more conservative justices.

Justice Kavanaugh: You —you said if —if we take the history out of the case. We can't take the history out of the case.

Jason Davis: No, Justice Kavanaugh. I'm not saying, that's what I'm saying exactly —

Justice Kavanaugh: It was 42 —42 potential African American Americans and 41 are stricken, right?

Jason Davis: Yes, Your Honor, that is correct.

Justice Kavanaugh: We have to—that's relevant, correct?

Jason Davis: That is relevant, yes, Your Honor. The —as this Court has held in Miller-El, history is part of the consideration.

This was a key moment. Justice Kavanaugh is the newest justice on the Court, so his positions aren't as well staked out as a lot of the other members. And what he was saying seemed favorable to Curtis.

Justice Kavanaugh was clearly interested in talking about the history of the case and the importance of that history. Justice Kavanaugh pointed out that D.A. Doug Evans struck almost every black juror he could. Although, and this is just an aside, our analysis found slightly different numbers than the ones Justice Kavanaugh is citing. We found that Doug Evans actually struck 41 of the 47 black jurors he had the power to strike.

Justice Kagan, one of the more liberal justices, picked up on what Justice Kavanaugh was saying.

Justice Kagan: So you agree that it's not only the adjudicated Batson violations that are relevant but also the number of strikes such as Justice Kavanaugh listed?

Jason Davis: I do with qualification. There —the strikes were unique. The strikes in this case are supported in the record. Each of the jurors that were struck either worked with a relative, were related, or knew, intimately, family members, the defendant or his family members, up to and including one juror who lied on her questionnaire and then admitted to lying on the stand.

The argument wasn't going well for the state, but up until this point at least the mood in the room was pretty restrained. People weren't showing much reaction to what the lawyers or the justices were saying. Everyone was just listening.

But if I could point to a moment when that shifted irreversibly, it would be this moment right here.

Jason Davis: and this is one of the issues with this case, is that each one of these strikes that we have...

Jason Davis was answering a question about the jury strikes in trial six, when one of the court's more liberal justices, Justice Breyer, interrupted him.

Jason Davis: ...we don't have one single reason. We have numerous –

Justice Sotomayor: That –

Justice Breyer: All right. Let -let's look at them. But you do have history. Trial 1: Five black juror possible, uses peremptories, strikes all five. Trial two: Five black jurors possible, uses all five, strikes all five blacks. Okay. Trial number three: There were 17 black possible. He uses only 15 this time. Why? Because he ran out of peremptories. He only had 15. All right. Fourth trial: 16 black. He only struck 11. That's because he only had 11 peremptories perhaps. All right? Now we come to this trial with that background. Okay. And I don't think it's going to take much once you have that background.

It wasn't a surprise that Justice Breyer would say something like this given that he is one of the more liberal justices on the Court. But it had an effect. People started stirring in their seats and glancing at each other, like something was about to happen.

What Justice Breyer seemed to be saying was look, given all this history, it's not going to be hard to convince me that the prosecutor violated the Constitution in the latest trial.

And Justice Breyer kept going, right into the facts of jury selection in the sixth trial and back to the jurors Carolyn Wright and Pamela Chesteen.

Justice Breyer: So now let's look at one black juror, one white one, potential. OK? Let's call them 1 and 2. Both are women. Both are in their mid-40s. Both have some college education. Both strongly favor the death penalty. Now the potential black actually has a brother serving as a prison guard. Now you would have thought that might have favored the prosecution in the prosecutor's mind. OK. So that's one difference. I don't think that cuts in your favor. Then have they ever had anybody arrested, you know? No, neither has. And do they know people in the case? Yeah. They each know something over 30 people, same, same, same, same. Now is there a connection with the Flowers family? Well, the black juror did, in fact, possibly work at some distance, we don't know quite what, with the father at Walmart, and the white one knew his father, mother, sister, cousin, through her work as a bank teller. And then we get the last thing, which the Mississippi Supreme Court thought was so crucial, is that the –the black potential juror was sued for overdue credit, and maybe she paid the garnishment of \$30. I don't know. But the white juror had been a friend of the victim's daughter in high school. OK? There we have it. Potential black, potential white. And we have the whole background. Now, looking at that, you tell me, what was the difference as to why he could strike, if that background, Carolyn Wright, the potential African American juror who was Number 4, and Pamela Chesterton, the potential white American juror who was Number 17. What's the difference? What's the difference given all those similarities?

Jason Davis: Juror 14, Carolyn Wright, was struck because she was sued by Tardy.

Justice Breyer: Yeah.

Jason Davis: Juror 14, Carolyn Wright, worked with the defendant's father, Archie, at Walmart.

Justice Breyer: Yep.

Jason Davis: The distinction would be the –

Justice Breyer: Wait, wait. You didn't add that Juror Number 17 had been a friend of the victim's daughter in high school and also knew Flowers' father, mother, sister, and a cousin through her work as a teller at the bank.

Jason Davis: Wright's relationship with the father was a work relationship, an employee/employee relationship. Chesterton was a bank teller, admitted that she just saw them coming in through the bank. So this was a, an employee and customer relationship, which the Mississippi Supreme Court made a distinction.

Justice Breyer: In other words, it was closer, the first relationship?

Jason Davis: Well, the –

Justice Breyer: And the record when I read that will bear out that the first one really was a closer relation than seeing them every week or whatever as a bank teller.

Jason Davis: Well, the record –

Justice Breyer: Will –will it say that? I don't think it will because I think they said, well, how closely physically did you work with the –the father? And there was no answer to that question.

Jason Davis: The –the record will bear out that the district attorney only struck those individuals that worked with members of his family. And that was consistent.

Justice Breyer: OK. So that's the reason. The distinction is when I go back in the record, I have to say, knowing Flowers' father, mother, sister, cousin through the work as a bank

teller is not a good reason for striking somebody. But working with Flowers' father at some unknown distance at Walmart is. And that's the crucial difference I will find. There is a difference there, but is there anything else? Because, after all, I have the history, plus –plus now I've narrowed it down –that's why I asked –I've narrowed it down to that being the difference.

Jason Davis: Again, Justice Breyer, I would also say that one of the differing things was that she was sued by Tardy.

Justice Breyer: Yes.

Jason Davis: Which was a theme with at least one other –

Justice Breyer: Right. And so I also should look at that and then decide whether that really is more significant than the fact that Number 17 was friends with the victim's daughter in high school. You know, sometimes you're friends with your high school -- your high school pals you don't forget. So –so I –so those are the two things I should look at. Is there anything else?

Jason Davis: I think that's enough, Your Honor.

Justice Kagan: I mean, in many –

Justice Breyer: Well, I do too.

(Laughter.)

Jason Davis was in a tough position. He couldn't dispute the record in the case that Doug Evans had been found twice to have violated the Constitution in jury selection in the earlier Flowers trials. That had already been decided. And Jason Davis knew that the Supreme Court had already found in earlier cases that the history of a prosecutor matters. So he really didn't have much choice but to concede that Evans had a history of discrimination and that that history matters.

Perhaps sensing weakness in the state's case, the other justices pounced. Justice Sotomayor brought up other misconduct on the part of Doug Evans in the Flowers' trials, misconduct that the Mississippi Supreme Court had cited when it overturned Curtis' previous convictions.

Justice Sotomayor: Weren't there two cases that were overturned or –in which prosecutorial misconduct –at least the first was overturned on prosecutorial misconduct. They didn't even reach the Batson challenge.

Jason Davis: Yes, Your Honor.

Justice Sotomayor: But doesn't that tell you something about this man's passion for this case? I –I don't even need to call it anything else, but doesn't that tell you how you should be looking at this case?

Jason Davis: I –I can't speak to his passion for the case, Your Honor. I can speak to his pursuit of conviction in this in the sense of the six trials, which –in which there –there were –

Justice Sotomayor: But he didn't –I understand he didn't ask the attorney general to step in, which he could have, to prosecute the case.

Justice Sotomayor is a former prosecutor. So is Justice Alito. And both of them seemed incredulous that Doug Evans was still allowed to try this case. They wanted to know whether the A.G.'s office had ever tried to intervene. Here's Justice Alito.

Justice Alito: Well, could we say in –in this case, because of the unusual and really disturbing history, this case just could not have been tried this sixth time by the same prosecutor? That he—that he just cannot—in light of the history, you just can't untangle what happened before from the particular strikes in this case?

Jason Davis: But, again, Your Honor, you know, hindsight is 20/20. I –I was not involved in any consideration on that. Had I been, it –it might have been a suggestion of mine that that be the case, but that wasn't.

Experts who had gamed out what might happen in oral arguments had told us that the justice to watch would be the chief justice, John Roberts—that Roberts, of all the conservative justices would be the one who'd be the most likely to say something that would indicate some sign of support for Curtis Flowers. But it wasn't Chief Justice Roberts who did that. It was the newest justice on the court, Brett Kavanaugh.

Justice Kavanaugh: In Batson, we held that a prosecutor cannot state merely that he challenged jurors in the defendant's case –of the defendant's race on the assumption or his intuitive judgment that they would be partial to the defendant because of their shared race. That was really the critical sentence in Batson, and the dissent disagreed with that. The critical change. You can't just assume that someone's going to be favorable to someone because they share the same race.

And then, Justice Kavanaugh asked what was arguably one of the toughest questions the state got.

Justice Kavanaugh: And when you look at the 41 out of 42, how do you look at that and not come away with thinking what was going on there was what the dissent in Batson said was permissible, that the majority said was not permissible, that there's a stereotype that you're just going to favor someone because they're the same race as the defendant?

Jason Davis: I respectfully, in this case, in no way agree that there was some prior determination made by the district attorney that –that because of this person's race, they were not going to be favorable. Again, this case has spanned some 23 years now in this small community. One of the inherent problems that –

Justice Kagan: But I –I guess I don't understand how you can say this.

Justice Kagan interrupted.

Justice Kagan: In this case, there were three adjudicated Batson violations.

Jason Davis: Two.

Justice Kagan: Okay, two.

(Laughter.)

Jason Davis: Two. The –Flowers III and Flowers II both had adjudicated Batson issues. That the trial court was aware of that was evident. The same trial judge presided over the fifth trial.

Jason Davis was talking about the trial judge, Judge Joey Loper. This is Justice Sotomayor.

Chief Justice Roberts: Justice Sotomayor...

Justice Sotomayor: Did you just say that the same judge who tried the fifth trial also tried the sixth –the sixth trial?

Jason Davis: Yes, Your Honor.

Justice Sotomayor: And wasn't he the judge that ordered Mr. Evans to prosecute the sole holdout juror in the fifth trial?

That juror was James Bibbs, a black man who'd held out against voting for guilt in the fifth trial. After the trial ended in a hung jury he was arrested for perjury on Judge Loper's order and led out of the courtroom in handcuffs. The case against Bibbs was later transferred to the A.G.'s office and then dismissed. The legal term for this is "nolle prossed."

Jason Davis: There–

Justice Sotomayor: And didn't Mr. Evans do that?

Jason Davis: There –

Justice Sotomayor: And the attorney general take over the case and say there was no basis for that prosecution?

Jason Davis: There were two jurors that were bound over to the grand jury on the basis of perjury. One pleaded guilty to that, and the other was nolle-prossed. Again –and that was handled by the Attorney General's office, not my division but another.

Justice Sotomayor: But I think the attorney general nolle-prossed it because there was no basis for that prosecution.

Jason Davis: I don't know that there was not a basis. I just know that it was nolle-prossed.

Toward the end of the state's time, Justice Brett Kavanaugh looked out at the audience assembled in the room. And then he turned back to Jason Davis.

Justice Kavanaugh: Part of Batson was about confidence of the community and the fairness of the criminal justice system, right?

Jason Davis: Yes, Your Honor.

Justice Kavanaugh: And that was against a backdrop of a lot of decades of all-white juries convicting black defendants. Swain said let's put a stop to that but really didn't give the tools for eradicating discrimination, so you had another 21 years of that, until Batson. And then Batson said: We're going to give you the tools to eradicate that so that the –not just for the fairness to the defendant and to the juror, but that the community has

confidence in the fairness of the system. And can you say, as you sit here today, confidently you have confidence in the –how this all transpired in this case?
Jason Davis: I have confidence in this record, Justice Kavanaugh. I have confidence in the strikes that this district attorney made based on the four corners of this record. I have confidence that, if reviewed with an eye towards what actually transpired, it supports the Mississippi Supreme Court's decision in this case. That I have confidence in.
Justice Kavanaugh: Thank you.

It was a devastating conclusion to the state's argument. The newest conservative justice on the court appeared to be siding with Curtis Flowers. If Curtis were to get Justice Kavanaugh's vote, plus the votes from at least the four liberal justices, those five votes alone would be enough to overturn his conviction. And it seemed, based on the oral arguments, that it was possible that Curtis could also get the votes of some of the other conservative justices.

Curtis' lawyer, Sheri Johnson, had reserved a few minutes of her time for rebuttal.

Chief Justice Roberts: Thank you counsel, you have four minutes remaining, Ms. Johnson.

But in an apparent show of confidence.

Sheri Johnson: Unless this Court has further questions, I will waive rebuttal.

A few seconds passed. And then, something happened that no one in the room was expecting.

Justice Thomas: Ms. Johnson...

It was Justice Clarence Thomas. He was asking a question, something he hadn't done since 2016. This was only the second question Justice Thomas had asked in oral arguments in the past 13 years.

It seemed as though everyone in the room rose out of their chairs a bit to make sure that what we were all hearing was actually happening. A question from one of the most silent justices in the court's history.

Justice Thomas: Would you be kind enough to tell me whether or not you exercised any peremptories?

Sheri Johnson: I was not the trial lawyer.

Justice Thomas: Well, did your—were any peremptories exercised by the defendant?

Sheri Johnson: They were.

Justice Thomas wanted to know not about the state's strikes, but about the strikes by the defense in Curtis' latest trial.

Justice Thomas: And what was the race of the jurors struck there?

Sheri Johnson: She only exercised peremptories against white jurors. But I would add that the motive –her motivation is not the question here. The question is the motivation of Doug Evans.

At this point, Justice Sotomayor jumped in, apparently to help Curtis' lawyer explain why the defense only struck white people from the jury.

Justice Sotomayor: She didn't have any black jurors to exercise peremptories against – except the first one?

Sheri Johnson: Except the first one.

Curtis' defense used strikes against white people because by the time it was their turn to make their strikes, the District Attorney Doug Evans had already struck almost all the black people from the jury. There was only one black prospective juror for the defense to strike. Everyone else was white.

Sheri Johnson wrapped up.

Sheri Johnson: When all of the evidence in this case is considered, just as in Foster versus Chatman, the conclusion that race was a substantial part of Evans' motivation is inescapable, and the Mississippi Supreme Court's conclusion to the contrary is clearly erroneous.

Chief Justice Roberts: Thank you, counsel. The case is submitted.

And with that, oral arguments were over.

Outside, people were streaming out of the Court and milling around on the plaza out front. Curtis' lawyer, Sheri Johnson appeared at the top of the Courthouse steps.

(applause)

Madeleine Baran: So, this is the applause for the defense side. They've all gathered at the top of the courthouse.

Sheri Johnson set up for a quick press conference.

Sheri Johnson: I'm Sheri Johnson. S-h-e-r-i...

The crowd dispersed.

After almost everyone had left, I spotted Jason Davis, the attorney who had argued for the state. He'd come out a side exit with a few colleagues.

Unidentified person: We're not answering questions, so go.

Madeleine Baran: Hi Mr. Davis.

Unidentified person: We're not answering questions. Go on.

Natalie Jablonski: How do you think –

Jason Davis: I'm not, I can't answer questions. Our office doesn't allow it. It has to go through them. There are times I wish I could, but I'm prohibited from doing so.

Madeleine Baran: Is this one of those times?

Jason Davis: Yes, I can't – they won't let me. They won't allow me. I like my job.

Madeleine Baran: So no comment on how you felt it went?

Jason Davis: I can't, I can't.

Unidentified person: He just said that, he just said it. Don't ask questions. Just go on.

Jason Davis: Thank you.

Madeleine Baran: OK.

Doug Evans, the district attorney whose handling of the case had led it to this point, wasn't there. I don't know if Evans followed the arguments or what he made of them. When we tried to call his office on Wednesday, no one answered. And when we tried to follow up later that week he never got back to us.

So now, we wait. The Supreme Court is expected to announce the decision by the end of June. As soon as it does we'll bring you a new episode.

In the Dark is reported and produced by me, Madeleine Baran, senior producer Samara Freemark, producer Natalie Jablonski, associate producer Rehman Tungekar, and reporters Parker Yesko and Will Craft.

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